Rosita bte Baharom (an infant) v Sabedin bin Salleh

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-504-91
HARUN HASHIM SCJ, LC VOHRAH AND ANUAR JJ
22 FEBRUARY 1993

Civil Procedure *— Pleadings — Need for particulars — Circumstances where evidence given at a trial can overcome defect in pleadings*

The plaintiff, who was collided into from the rear by the defendant riding a motor scooter, brought an action for damages against the defendant for injury to her person allegedly caused by the negligence of the defendant. The learned trial judge dismissed the plaintiff's claim for damages, finding as a fact that the plaintiff was actually to be blamed for the accident. [See [1992] 1 MLJ 379.] The plaintiff appealed. Counsel for the plaintiff argued that the finding of the learned judge should be reversed on the ground that he had failed to consider the question of contributory negligence on the part of the defendant.

Held, dismissing the appeal:
Although no particulars of contributory negligence on the part of the defendant were ever given, in appropriate circumstances, evidence given at a trial can overcome defects in the pleadings of the plaintiff as long as the defendant from the very outset has not been misled, prejudiced, embarrassed or in any way taken by surprise or led astray by the plaintiff's pleadings. The trial judge was right in reaching the conclusion that the defendant had been taken by surprise and was therefore prejudiced by the latest amendment at such a late stage.

[Bahasa Malaysia summary

Plaintif, yang telah dilanggar dari belakang oleh defendan semasa defendan menunggang skuternya di jalanraya, telah membawa satu tindakan untuk gantirugi terhadap defendan untuk kecederaan ke atas dirinya yang didakwa disebabkan oleh kecuaian defendan. Hakim perbicaraan yang arif telah menolak tuntutan plaintif untuk gantirugi, membuat keputusan bahawa plaintif sepatutnya dipersalahkan untuk kemalangan itu. [Lihat [1992] 1 MLJ 379.] Plaintif telah membuat rayuan. Peguambela untuk plaintif telah berhujah bahawa keputusan hakim yang arif itu sepatutnya dimansuhkan atas alasan bahawa beliau telah gagal mempertimbangkan soalan kecuaian sertaan pada pihak defendan.

Diputuskan, menolak rayuan itu:
Walaupun butir mengenai kecuaian sertaan pada pihak defendan tidak diberi di dalam keadaan tertentu, keterangan yang diberi di dalam suatu perbicaraan boleh mengatasi kekurangan di dalam pliding plaintif asalkan defendan dari mula lagi tidak dikelirukan, dimudarat-

kan, dimalukan atau dalam sebarang segi dikejutkan atau disesatkan oleh pliding plaintif. Hakim perbicaraan telah betul membuat keputusan bahawa defendan telah ditangkap secara mengejut dan oleh itu telah ditimpa mudarat oleh pindaan terbaru pada peringkat yang begitu lewat.]

Cases referred to

1 *Butterfield v Forrester* (1809) 11 East 60 (refd)
2 *Taylor v Simon Carves Ltd* [1958] SLT (Ch Ct) 23 (refd)
3 *Wong See Leng v C Saraswathy Ammal* [1954] MLJ 141 (refd)
4 *Tan Lian Chye v Malayan Railway Administration* [1967] 2 MLJ 276 (refd)
5 *Menah bte Sulong v Lim Soo & Anor* [1983] 1 CLJ 26 (refd)
6 *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 (refd)
7 *Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 (refd)
8 *Ang Koon Kau v Lau Piang Ngong* [1984] 2 MLJ 277 (folld)
9 *Seng Chong Metal Works Ltd v Lew Fa* [1966] 2 MLJ 63 (folld)
10 *Noor Azahar bin Habin v Rajaswari a/p Sithampara Pillai & Anor* [1991] 1 CLJ 150 (refd)
11 *Farrel v Secretary of State for Defence* [1980] 1 All ER 166 (folld)

Legislation referred to

Law Reform (Contributory Negligence) Act 1945 s 1(1)

Appeal from: Civil Suit No 25–41–81 (High Court, Penang)

Chen Kok Keong (*Rhina Bhar & Assocs*) for the appellant.
Balachandran Mahesan (*Bala Mahesan & Co*) for the respondent.

Cur Adv Vult

LC Vohrah J (delivering the judgment of the court): This is an appeal from the judgment of Edgar Joseph Jr J (as he then was) dismissing the claim of the plaintiff. The action is one of negligence and arose out of an accident along the Sungai Acheh/Tanjong Berembang Road in Penang on 28 April 1977 in which the plaintiff, then aged ten years, suffered rather severe injuries.

The case for the plaintiff was that as she was walking side by side with her sister (PW2), then apparently aged six years, close to her left edge of the road 16ft wide in the direction of Tanjong Berembang with the intention of boarding a bus at a point on the other side of the road on their way to school, she was collided into from the rear by the defendant riding a Vespa motor scooter. The case for the defendant, on the other hand, was that he was proceeding along the road in a normal manner at a reasonable speed in the same direction when the plaintiff without any warning, suddenly darted across the road from his right to his left leaving him no opportunity to avoid the collision.

The plaintiff herself did not testify at the trial and the evidence on her behalf as to how the accident occurred was furnished by a family friend

(PW1) who happened to be at the scene at the time of the accident and by PW2.

PW1, who was a neighbour of the plaintiff and was aged 14 years at the time, testified that he witnessed the collision at about 7.15 am when he was waiting for a bus on the left-hand side of the road as one faced Tanjong Berembang whilst the plaintiff was walking on the same side of the road in his direction on the metalled surface of the road about 3ft from the edge of the road with PW2 walking abreast of her on her left along the side-table. He then saw a scooter coming from behind the plaintiff and colliding into her as a result of which she fell on to the ground and lost consciousness. PW2 also stated that she was walking abreast of the plaintiff who was then about 3ft from the edge of the road when the scooter, which came from behind, knocked into the plaintiff.

The evidence for the defence was given by the defendant alone. He, on the other hand, testified that at the material time, he was riding his scooter at about 30kph about 3–4ft from his left edge of the road on his way to work in the direction of Tanjong Berembang when he noticed three girls standing on the grass verge to his right about four electric poles away. When he had slowed down whilst approaching a bend and was about 6ft from them, one of the girls dashed across the road into his path with her arms out-stretched and flapping in the air like the wings of a bird leaving him no opportunity of avoiding a collision as a result of which the plaintiff fell on her back with her head coming to rest near the central white line. He too fell and his scooter came to a rest on his right-hand side of the road. After carefully scrutinizing the totality of the evidence, oral and otherwise, and after keenly weighing the credibility of the witnesses, the learned judge believed the defendant and found his version of the circumstances relating to the collision to be correct. We have reviewed the whole of the evidence and find ourselves in full agreement with the learned judge's finding as a fact 'that at the material time the plaintiff was crossing the road from the right to the left when she was knocked down by the defendant who was proceeding along his right of way' and that the plaintiff was actually to blame for the accident. That really should dispose of this appeal but learned counsel for the plaintiff in his arguments before us has invited us to reverse the finding of the learned judge on the ground that he had failed to consider the question of contributory negligence on the part of the defendant. He argued that even if the version of the defence was believed wholly by the learned judge, the defendant should, on the basis of his own version, have been found to have been partly responsible for the accident. The point of his argument is that having regard to the speed at which the defendant was travelling and to the fact that the defendant had seen the girls some 198ft (the distance agreed to by both counsel as the distance between four electric posts) away, the collision could have been avoided if he had kept a proper look-out. It is to be noted that this plea of contributory negligence has been set up not as a shield in a statement of defence but as part of the claim of the plaintiff. As is well-known, until comparatively recently at common law the plea of contributory negligence operated as an absolute defence to an action based on negligence (vide *Butterfield v Forrester*[1]) and the rigidity of that law was mitigated only with the passing of the English Law Reform (Contributory Negligence) Act 1945 s 1(1) which provides:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: ...

The provisions of s 12(1) of our Civil Law Act 1956 are identical to the above provisions and the primary purpose of these provisions was to alter the law whereby a claim was defeated by contributory negligence, and to substitute, in such circumstances, an apportionment of liability (vide *Taylor v Simon Carves Ltd*[2]). Be that as it may, the plaintiff in this case filed her original statement of claim on 31 May 1979 alleging in para 3 thereof that she 'was standing along the *middle white line* of the road between Sungai Acheh and Tg Berembang ... when the defendant drove his motor cycle from the direction of Sungai Acheh ... so negligently that he collided into the infant plaintiff'. In her *amended* statement of claim filed on 4 February 1987, she alleged this time in para 3 thereof that she 'was *standing along the right edge* of the road between Sungai Acheh and Tg Berembang as one faces Sungai Acheh ... when the defendant drove his motor cycle from the direction of Sungai Acheh ... so negligently that he collided into the infant plaintiff'. In her *re-amended* statement of claim filed on 16 February 1987, she alleged yet differently in para 3 thereof that she 'was *walking along the middle white line* right edge of the road between Sungai Acheh and Tg Berembang as one faces Sungai Acheh ... when the defendant drove his motor cycle from the direction of Sungai Acheh ... so negligently that he collided into the infant plaintiff'. In her *further re-amended* statement of claim filed on 5 February 1991, after, we note, the close of the case for the defence on 14 February 1990, she finally alleged in para 3 thereof that she '*was standing along the right edge of the road* between Sungai Acheh and Tg Berembang as one faces Sungai Acheh ... when the defendant drove his motor cycle from the direction of Sungai Acheh ... so negligently that he collided into the infant plaintiff' and added a new para 3A alleging that 'the said collision was caused solely and/or contributed to by the negligence of the defendant in the management and control of the said motor cycle no PK 2533'. No particulars of contributory negligence on the part of the defendant were ever given. The learned judge then reviewed a series of authorities, namely *Wong See Leng v C Saraswathy Ammal*,[3] *Tan Lian Chye v Malayan Railway Administration*,[4] *Menah bte Sulong v Lim Soo & Anor*,[5] *KEP Mohamed Ali v KEP Mohamed Ismail*,[6] *Siti Aisha bte Ibrahim v Goh Cheng Hwai*,[7] and *Ang Koon Kau v Lau Piang Ngong*,[8] and came to the conclusion that there is 'a consistent current of judicial opinion for the proposition that a plaintiff in a running down case can depart from his pleadings at the hearing provided the defendant is not taken by surprise'. Having considered the relevant authorities ourselves, we would agree that in appropriate circumstances, evidence given at a trial can overcome defects in the pleadings of the plaintiff as long as the defendant from the very outset has not been misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleadings (vide *Siti Aisha*'s case,[7] per Abdul Hamid FJ (as he then was) at p 126). However, in the present case

A the learned judge noted that in the further re-amended statement of claim, the plaintiff had alleged that she was *standing* on the right edge of the road preparing to cross the road to catch a bus when she was knocked down by the defendant. He observed that at the hearing, PW1 and PW2 whom she called to give evidence on her behalf, had said that she was *walking* along the side of the road when she was knocked down by the defendant from the B rear whilst the evidence of the defence was that she was crossing the road when the collision occurred. The learned judge was thus faced with the task of having to decide whether learned counsel for the plaintiff was at liberty during his final submission on 7 May 1991, to rely on the defendant's evidence in order to make out a case of contributory negligence on the part C of the defendant especially when the earliest indication that such argument might be advanced was given, as the learned judge stated, only on 6 February 1991, long after the parties had closed their respective cases at the hearing, when it became known that para 3 of the original statement of claim was amended for the third time and the totally new para 3A was added. Even then, as was stressed by the learned judge, no particulars of the D contributory negligence were given and although the learned judge opined that the effect of this omission was 'as good as not pleading the point at all' he nevertheless leaned in favour of the plaintiff and assumed that it had been pleaded without particularization. It is clear from the judgment of the learned judge that he was rightly concerned that the defendant should not E be taken by surprise and thus be prejudiced by this late amendment long after the hearing of the evidence adduced by both parties had been concluded. After considering the prevailing authorities relating to the function of pleadings and the circumstances of this case, the learned judge came to the conclusion that the defendant had been taken by surprise and was therefore prejudiced by the latest amendment at such a late stage. Two F considerations affected his conclusion. The first was the statement of Murray-Aynsley CJ in *Wong See Leng*'s case[3] which impelled him to the view that as soon as the defence had been delivered, the plaintiff should have promptly pleaded in the alternative to the effect that if negligence on the part of the plaintiff was shown, the defendant was also negligent and but G for that negligence, the collision would not have occurred. The second was the statement of Thomson LP in *Seng Chong Metal Works Ltd v Lew Fa*[9] which influenced him into taking the view that learned counsel for the plaintiff should have put her case to the defendant in cross-examination that even on his own version, he was guilty of contributory negligence. He explained that then the defendant would not have been taken by surprise H and thus prejudiced because 'then most probably the re-examination of the defendant and generally the case for the defendant would have been differently developed'. We find ourselves in agreement with the conclusion reached by the learned judge in the circumstances of this case and in the light of the prevailing authorities he referred to. We do not think, as was I suggested by learned counsel for the plaintiff, that the learned judge was delving into the realm of mere technicality when he reached the conclusion that he did. The system of pleadings has not been designed to be weighted in favour of the plaintiff but to ensure, as has been said time and again, that there is fair play between the parties and that each party knows what issues

he has to meet on the pleadings in advance. In the course of this appeal, we have been alerted to the cavalier manner in which pleadings are being drawn up in negligence cases at the present time (vide *Noor Azahar bin Habin v Rajaswari a/p Sithampara Pillai & Anor*,[10] per Richard Talalla JC (as he then was) at p 155) and as exemplified by this case, and we think it would not be out of place to express a cautionary reminder in the very apt words of Lord Edmund-Davies in *Farrel v Secretary of State for Defence*[11] as follows at p 173:

> It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstance may arise when the grant of permission would work injustice or, at least, necessitate adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

In the event, the appeal is dismissed with costs. The deposit in court shall be paid out to the account of the taxed costs of the defendant as the respondent herein.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim